(1)

FILED

00 625 OCT 16 2000

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

SURINDER BAINS,

Petitioner,

v.

STEVE CAMBRA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

CLIFF GARDNER*
1738 Union Street
San Francisco, CA 94123
Tel: (415) 922-9404

RICHARD C. NEUHOFF
600 Harrison Street, Suite 535
San Francisco, CA 94107
Tel: (415) 543-0433

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

73 pp

QUESTIONS PRESENTED

Petitioner is Indian and a member of the Sikh faith. He was charged with murder. At trial, the court admitted expert testimony that members of the Sikh faith have a propensity to kill. In closing argument, the prosecutor again and again called the jury's attention to this racially inflammatory evidence. On appeal, although the state reviewing court recognized this evidence had no place in an American courtroom, it refused to apply the standard of prejudice articulated in *Chapman v. California*, 384 U.S. 18 (1967) to this basic constitutional error.

On federal habeas review, although the case was governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the federal court refused to apply AEDPA to the question of prejudice. Moreover, even though the state courts had refused to apply the *Chapman* standard to this egregious constitutional error, the federal courts also refused to apply *Chapman* to the error. These facts present two important questions as to which the lower federal courts are sharply divided:

> 1) The first question is whether Congress intended to exempt prejudice questions from AEDPA's general standard of review. More specifically, the question is whether the state court's refusal to apply the *Chapman* standard was contrary to "clearly established Federal law, as determined by the Supreme Court of the United States" within 28 U.S.C. § 2254(d) as enacted by AEDPA and, if so, whether relief may be denied on federal habeas corpus review without the federal court itself applying the "clearly established Federal law" ignored by the state court?

QUESTIONS PRESENTED – Continued

2) Assuming § 2254(d)'s standard of review is inapplicable to questions of prejudice, the second question presented is whether a defendant may be denied relief on federal habeas corpus review where fundamental constitutional error has occurred but no state or federal court has ever applied the proper harmless error test to evaluate the error?

A third question presented by this Petition for Writ of Certiorari relates to a *Miranda*-less interrogation that occurred after petitioner's home was searched pursuant to a warrant. The question is simple. Do police have blanket authority to withhold *Miranda* warnings from a suspect who has voluntarily accompanied officers to a police station for interrogation, unless and until the suspect on his or her own asks to leave the interrogation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

ARGUMENT 10

I. CERTIORARI MUST BE GRANTED TO RESOLVE A SPLIT OF AUTHORITY IN THE CIRCUITS AS TO WHETHER CONGRESS INTENDED TO TREAT PREJUDICE QUESTIONS DIFFERENTLY FROM OTHER CONSTITUTIONAL QUESTIONS IN 28 U.S.C. § 2254(D) 10

II. CERTIORARI MUST BE GRANTED TO RESOLVE A SPLIT OF AUTHORITY IN THE CIRCUITS AS TO WHETHER A STATE MAY BENEFIT FROM THE MORE LENIENT *BRECHT* STANDARD OF PREJUDICE EVEN WHERE IT REFUSES TO APPLY THE MORE RIGOROUS *CHAPMAN* STANDARD ON DIRECT REVIEW 16

TABLE OF CONTENTS – Continued

Page

III. CERTIORARI MUST BE GRANTED TO DECIDE WHETHER A SUSPECT WHO ACCOMPANIES POLICE TO THE POLICE STATION CAN EVER SUBSEQUENTLY BE DEEMED "IN CUSTODY" FOR PURPOSES OF *MIRANDA* WITHOUT SPONTANEOUSLY TRYING TO LEAVE THE STATION OR REQUESTING COUNSEL 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000) 1, 5, 6, 16, 18, 22

Barber v. Johnson, 145 F.3d 234 (5th Cir. 1998)... 17, 18, 19

Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999) 15

Barker v. Yukins, 993 F.Supp. 592 (E.D. Mich. 1998) 14

Brady v. Maryland, 373 U.S. 83 (1963)..... 13

Brecht v. Abrahamson, 507 U.S. 619 (1993)..... *passim*

Bryson v. Ward, 187 F.3d 1193 (10th Cir. 1999)....14, 15

Castro v. Oklahoma, 71 F.3d 1502 (10th Cir. 1995)..... 17

Chapman v. California, 384 U.S. 18 (1967) ..... *passim*

Cox v. Norris, 133 F.3d 565 (8th Cir. 1997)..... 17

Crespin v. New Mexico, 144 F.3d 641 (10th Cir. 1998) 17

Faretta v. California, 422 U.S. 806 (1975) 13

Feltrop v. Bowersox, 91 F.3d 1178 (8th Cir. 1996)..... 24

Gilliam v. Mitchell, 179 F.3d 990 (6th Cir. 1999) 17

Harrington v. Iowa, 109 F.3d 1275 (8th Cir. 1997)..... 17

Hassine v. Zimmerman, 160 F.3d 941 (3d Cir. 1998) 17

Hogue v. Johnson, 131 F.3d 466 (5th Cir. 1997)..... 17

Lyons v. Johnson, 912 F.Supp. 679 (S.D.N.Y. 1996) 17

Moore v. Calderon, 108 F.3d 261 (9th Cir. 1997)..... 13

Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999) 13

TABLE OF AUTHORITIES – Continued

Page

Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998)..... 13

Nevers v Killinger, 990 F.Supp. 844 (E.D. Mich. 1998)..... 14

Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999) 15

Newman v. Hopkins, 192 F.3d 1132 (8th Cir. 1999) 13

Oregon v. Mathiason, 429 U.S. 492 (1977)... 9, 22, 23, 24

Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1631 (1994).....17, 18

Rickman v. Dutton, 864 F.Supp. 686 (M.D. Tenn. 1994)..... 17

Rose v. Clark, 478 U.S. 570 (1986)..... 11

Roy v. California, 519 U.S. 2 (1993) 16

Sherman v. Smith, 89 F.3d 1134 (4th Cir. 1996) 17, 18

Strickland v. Washington, 466 U.S. 684 (1984)..... 13

Tankleef v. Senkowski, 135 F.3d 235 (2nd Cir. 1998) 24

Teague v. Lane, 489 U.S. 288 (1989) 18

Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995) 17

United States v. Glover, 104 F.3d 1570 (10th Cir. 1997)..... 24

United States v. Hunerlach, 197 F.3d 1059 (11th Cir. 1999)..... 23

United States v. Jones, 21 F.3d 165 (7th Cir. 1994) 24

United States v. Salvo, 133 F.3d 943 (6th Cir. 1998) 24

TABLE OF AUTHORITIES – Continued

Page

Washington v. Texas, 388 U.S. 14 (1967) 13

Williams v. Taylor, 529 U.S. ___, 120 S.Ct. 1495 (2000) 13, 14

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) ..... *passim*

UNITED STATES CONSTITUTION

Fifth Amendment 1, 2

Fourteenth Amendment 1, 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Surinder Bains respectfully prays that a Writ of Certiorari issue to review the judgement and decision of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's divided opinion was filed March 2, 2000. On July 26, 2000, the Ninth Circuit denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

OPINION BELOW

The Ninth Circuit Court of Appeals issued its divided opinion in this case on March 2, 2000, reported as *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000). A copy of that opinion is attached as Appendix A. On July 26, 2000, a divided Ninth Circuit panel denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. A copy of that order is attached as Appendix B, App. 41.

JURISDICTION

The opinion of the Ninth Circuit was filed on March 2, 2000. Rehearing was denied on July 26, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth and Fourteenth Amendments and 28 U.S.C. § 2254(d). In

relevant part, the Fifth Amendment provides that no person shall be deprived of liberty without "due process of law."

The Fourteenth Amendment provides:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In relevant part, 28 U.S.C. § 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

Petitioner is Indian and a member of the Sikh faith. He was charged with the murder of his former brother-in-law. The state's theory of the case was simple: petitioner hired someone to kill his former brother-in-law as revenge for the brother-in-law having divorced petitioner's sister four years earlier.

At petitioner's trial, and over heated objection, the prosecutor was allowed to introduce expert testimony and argument that unlike Americans, Sikhs have a propensity toward violence, revenge and murder. There was nothing subtle about the evidence introduced, or the prosecutor's explicit and repeated reliance on it in closing argument.

The prosecutor called expert witnesses to testify that Sikhs are not like Americans when it comes to divorce. RT 1724-1725, 1729.[1] The prosecutor's experts testified that in the Sikh faith, when a man divorces a Sikh woman, the woman's family will retaliate with violence if necessary – up to and including murder – in order to save the honor of the family. RT 1656-1661, 1664-1672, 1741. Unlike Americans, Sikhs will exact revenge when a Sikh woman is divorced; they will go to "any length" to gain revenge and carry out acts of violence in a methodical way. RT 1738-1741.

The prosecutor then relied extensively on this racially inflammatory evidence during his closing argument. He focused the jury's attention on the fact that petitioner wore a beard and a turban, explaining that the killing was typical in the Sikh culture and was meant as a message to the general Sikh community. RT 3653. This crime was "beyond the understanding of the American culture." RT 3650. Sikhs do not "play[ ] by the rules of the United States." RT 3653-3654. The divorce was a "cultural insult" which resulted in a "ritualistic statement of a

---

[1] Citations to "RT" refer to the Reporter's Transcript on Appeal from the state court trial. Citations to "CT" denote the Clerk's Transcript on Appeal from the state court trial.

disenchanted Sikh family;" Sikhs who learned of the killing would understand that the "Bains clan avenge[d] their honor" and "did what was expected of them" as Sikhs. RT 3701, 3708. One can "expect" violence from Sikhs. RT 3636. As the state appellate court would itself later hold, this racially divisive evidence and argument "painted a stereotype of Sikhs as having a propensity to use violence" and should never have been admitted. *People v. Bains*, State Court of Appeal No. H012289 at 40-43.

The prosecutor buttressed this racial evidence with equally inadmissible evidence about petitioner's family as a whole. Seeking to rely on a "conspiracy exception" to the hearsay rule, the state called various members of the victim's family to repeat hearsay statements purportedly made by members of petitioner's family **other than petitioner** in the years after the couple separated, statements in which the family members threatened the victim with physical harm. RT 731-732, 738-739, 784, 786-787, 791, 1021-1022, 1934. Over objection, the state trial court admitted these hearsay statements. As the state appellate court would later find, however, virtually every one of these statements was plainly inadmissible precisely because the evidence "does not reasonably imply the existence of a conspiracy. . . . " *People v. Bains*, H012289 at 33-37.

The prosecutor also supported his racial expert by calling the victim's friends and family to testify to hearsay statements the victim himself purportedly made after the separation. RT 782, 735, 765, 1017, 1023, 1112-1114, 1120, 1946. Over objection, the trial court admitted these hearsay statements. Once again, as the state appellate

court held, these statements should never have been admitted at trial. *People v. Bains*, H012289 at 31-33.

The jury deliberated more than 18 hours over the course of four days before convicting petitioner of first degree murder. CT 1332, 1420, 1422, 1427, 1428, 1431-1437.

On appeal in state court petitioner contended (1) admission of racially inflammatory expert testimony that Sikhs have a propensity to kill violated due process and (2) admission of statements which he could neither confront nor cross-examine violated his right to confrontation. The state appellate court agreed that errors had occurred, but refused to apply the prejudice standard set forth more than 30 years ago in *Chapman v. California*, 384 U.S. 18 to evaluate constitutional errors.

Petitioner sought federal habeas relief which was ultimately denied. On March 2, 2000, a divided Ninth Circuit panel affirmed the denial of relief. All three judges agreed with the state appellate court that petitioner's trial was marred by a series of errors, including introduction of racially inflammatory evidence in violation of due process and numerous Sixth Amendment confrontation violations. *Bains v. Cambra*, 204 F.3d at 971-974 (majority) and 980 (dissent). All three judges agreed that the state courts had never applied the proper harmless error standard in assessing these constitutional errors. *Id.* at 974 (majority) and 982 (dissent).

All three judges also agreed "the prosecutor relied upon the clearly and concededly objectionable arguments for the stated purpose of showing that all Sikh persons

(and thus [petitioner] by extension) are irresistibly predisposed to violence when a family member has been dishonored . . . and also are completely unable to assimilate to and to abide by the laws of the United States." *Bains v. Cambra*, 204 F.3d at 974 (majority) and 981 (dissent). All three judges agreed "the introduction of clearly inflammatory prosecutorial arguments very well might have had the effect of motivating the jury to draw and focus upon the impermissible inferences [regarding] . . . Sikh beliefs. . . . " *Id.* at 974 (majority) and 981 (dissent). All three judges agreed that the jury which heard the state's case at trial deliberated more than 18 hours over four court days before reaching its verdict. *Id.* at 970.

Although no court had ever applied the *Chapman* standard to assess these errors, two Ninth Circuit judges nevertheless held these errors harmless using the harmless error test set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). This Petition follows.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether a state conviction that involved serious federal constitutional errors may be upheld on federal habeas corpus without any court, state or federal, ever assessing those errors under the constitutional standard all parties agree is applicable to such errors (*i.e.*, the standard set forth in *Chapman v. California*). A negative answer to this question is compelled for two reasons, each of which presents a question that is ripe for review by this Court.

The first question is whether the central provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is applicable to questions of prejudice. That provision – section 2254(d)(1) of Title 28 of the United States Code – provides, in relevant part, that habeas relief shall not be granted as to a claim unless the state court's adjudication of the claim resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States."

When it comes to assessing the prejudicial impact of federal constitutional error, there plainly is "clearly established federal law, as determined by the Supreme Court" governing that question: the clearly established federal law is the *Chapman* test for harmless error. Thus, it would seem simple and straightforward that when cognizable constitutional error is found to have occurred under AEDPA, the federal habeas court is to look to the "clearly established federal [Supreme Court] law" concerning harmlessness in assessing that error, just as the court looks to clearly established Supreme Court law in ruling on the question of constitutional error in the first place. And a number of courts throughout the country have now so ruled. They have held that section 2254(d) governs the question of prejudice, not just the question of whether there was error, and thus that when a state court has erroneously refused to apply *Chapman*'s "clearly established federal law" to the prejudice issue, the state court has acted "contrary to" that clearly established law, within the plain meaning of section 2254(d).

However, a few courts, including the Ninth Circuit majority in this case, have refused to apply AEDPA to

prejudice questions, opting instead to use the habeas standard laid out by this Court prior to the enactment of AEDPA, in *Brecht v. Abrahamson*. These courts disregard AEDPA when it comes to the issue of harmlessness, as if there were an implicit "harmlessness" exception to the words of the statute (and, of course, leaving room for future courts to find other implicit "exceptions" to the application of AEDPA).

The question of whether AEDPA applies to prejudice inquiries in federal habeas cases is an issue of enormous import to the federal court system, appearing repeatedly in habeas cases now and in the future. Moreover, the issue of whether there are implicit "exceptions" to AEDPA is equally important, creating as it does further uncertainty in the meaning and scope of a law that is already confusing and uncertain enough and opening the door to future arguments by one side or the other as to additional "exceptions" to that law.

In short, the question of the prejudice standard to be applied in habeas cases is both fundamental and sure to recur. The lower federal courts are demonstrating increasing disagreement in the four and one-half years since the enactment of AEDPA. Moreover, this split of authority creates the opportunity for the creation of more tacit "exceptions" to AEDPA's applicability. This Court should step in and resolve the issue. Certiorari should be granted.

Even if section 2254(d) did not impact the standard of prejudice, there is a second reason to grant review in this case. Where the state courts have refused to apply *Chapman* to constitutional errors in the first instance, there is a

stark split of authority in federal courts throughout the country as to whether *Brecht* or *Chapman* is the appropriate standard to be applied in federal habeas review. Some courts hold that where no court has yet applied the *Chapman* standard, it is entirely appropriate to apply *Chapman* in federal habeas review. Others disagree, holding that whether the state courts apply *Chapman* is irrelevant and that *Brecht* must be applied. Still other circuits have decisions going both ways.

As the sheer number of conflicting appellate decisions on this question show, this issue is both an important and recurring one. The decisions also reflect a stark split of authority as to whether states may benefit from the more lenient *Brecht* standard of prejudice after refusing to apply the more rigorous *Chapman* standard on direct review. This is a basic question involved in innumerable federal habeas cases throughout the country, a question which is still unresolved. The question of prejudice from constitutional error should not depend on the fortuity of which jurisdiction a petitioner happens to be in. Certiorari should be granted.

Finally, certiorari should be granted in this case to address a quite separate issue of considerable import, namely, whether, as the Ninth Circuit majority below effectively held, this Court's decision in *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) relieves police officers of the need to give *Miranda* warnings to any suspect who voluntarily accompanies the police to the police station for interrogation, unless and until the suspect himself or herself affirmatively requests counsel or makes an effort to leave. Or put another way, must every suspect who voluntarily arrives at a police station for

questioning make a request for counsel or try to leave, and have that request denied, before he or she is deemed to be "in custody" for purpose of the *Miranda* rule?

The question is posed particularly starkly in this case, because if ever there were an in-custody interrogation of a such a person, this case is it: petitioner had already been accused in a search warrant affidavit of having responsibility for a murder, petitioner's home had been searched pursuant to warrant (while petitioner was present), and petitioner, who had no prior experience with police, was questioned in an interrogation room by multiple officers who from the outset accused him repeatedly of responsibility for murder. No reasonable person in this setting would have felt free to terminate the interview and leave the police station. Certiorari should be granted.

ARGUMENT

I.

CERTIORARI MUST BE GRANTED TO RESOLVE A SPLIT OF AUTHORITY IN THE CIRCUITS AS TO WHETHER CONGRESS INTENDED TO TREAT PREJUDICE QUESTIONS DIFFERENTLY FROM OTHER CONSTITUTIONAL QUESTIONS IN 28 U.S.C. § 2254(D).

The first reason to grant certiorari is to address an issue which is causing an increasing split of authority in the federal courts. The question is simple. Generally, when a state court decision is found to be contrary to a precedent of this Court, the remedy under section 2254(d)

has been for the federal habeas court to itself properly apply this Court's precedent. In this way, where state courts have failed or refused to apply the proper constitutional rule to a defendant's case, the defendant can finally be afforded that which the Constitution requires.

The question now is whether Congress intended a wholly different rule to apply to the prejudice inquiry. Where a state court refuses to apply the *Chapman* standard to a federal constitutional error, that decision is "contrary to clearly established Federal law" – *Chapman* itself. Unless the courts wish to carve out an exception unique (so far) to prejudice inquiries, an exception unjustified by any language in section 2254(d) itself, the remedy for such an error should be no different than the remedy for any other failure to apply this Court's precedents. The remedy is for the federal court itself to properly apply the federal precedent, in this case, *Chapman*. An increasing number of courts throughout the country have reached this precise result.

Prior to 1993, a criminal judgment had to be set aside if there had been federal constitutional error at trial unless the beneficiary of the error proved it harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. at 24. This standard was applied by reviewing courts on direct appellate review as well as in federal habeas review of state court judgments. *See, e.g., Rose v. Clark,* 478 U.S. 570 (1986).

In 1993, this Court relied on principles of comity between state and federal courts to announce a different standard for evaluation of federal constitutional errors in habeas proceedings. *Brecht v. Abrahamson,* 507 U.S. at

635-636. Significantly, however, *Brecht* did not purport to change the standard by which state courts must evaluate the prejudice from constitutional errors in the first instance. Even after *Brecht*, state courts are still required to apply *Chapman* to such errors on direct review in state court.

Instead, *Brecht* articulated a new standard of prejudice for federal courts to apply in habeas review of state court judgments. At least where state courts had once properly engaged in a *Chapman* analysis, on federal collateral review the state would no longer have to establish beyond a reasonable doubt that the error was harmless. Under *Brecht*, the state could demonstrate the error was harmless by showing that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638-639 and 641 (Stevens, J., concurring).

In 1996, Congress enacted AEDPA, working a major revision of federal habeas corpus. In 28 U.S.C. § 2254(d), Congress articulated a new standard for granting relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

Under this provision, "[a] state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495, 1519 (2000). Where a state court decision is indeed "contrary to" an existing Supreme Court precedent, the remedy is for the federal habeas court to itself apply the "clearly established Federal law" to which the state court decision was contrary. *Williams v. Taylor*, 120 S.Ct. at 1513-1526 (where state court decision was contrary to *Strickland v. Washington*, 466 U.S. 684 (1984), court determines if relief is warranted by itself applying *Strickland* test).

The federal courts of appeals have taken the same approach. Where a state court decision is contrary to "clearly established Federal law," the federal habeas court itself applies that "clearly established Federal law" to determine if relief is appropriate. *See, e.g., Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999) (in deciding whether prosecutor's suppression of evidence was contrary to *Brady v. Maryland*, 373 U.S. 83 (1963), the federal court itself applied *Brady*); *Newman v. Hopkins*, 192 F.3d 1132 (8th Cir. 1999) (in deciding whether state court's exclusion of evidence was contrary to *Washington v. Texas*, 388 U.S. 14 (1967), federal habeas court itself applied *Washington*); *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998) (applying *Brady v. Maryland*, 373 U.S. 83); *Moore v. Calderon*, 108 F.3d 261 (9th Cir. 1997) (applying *Faretta v. California*, 422 U.S. 806 (1975)).

The question presented here is whether a different rule will apply where the "clearly established Federal law" which the state courts have refused to follow is this

Court's decision in *Chapman*. In other words, when a state court refuses to apply *Chapman* to a constitutional error, does section 2254(d) require the federal court to itself apply *Chapman*, thereby ensuring that the defendant receives what he would have received had the state court applied the correct rule?

Certainly, nothing in the language of section 2254(d)(1) suggests that a state court's prejudice evaluation is to be treated differently. Indeed, *Williams v. Taylor*, 120 S.Ct. 1495, itself suggests that no such distinction should be made. There, the Court concluded that a state court decision was contrary to "clearly established Federal law" because it had applied the wrong standard of prejudice in evaluating an ineffective assistance of counsel claim. 120 S.Ct. at 1513. The Court granted relief after concluding that under the correct standard of prejudice, relief was required. 120 S.Ct. at 1514-1516.

The lower federal courts have reached sharply divergent views on this subject. In accord with the plain language of section 2254(d), some courts have held that where a state court refuses to apply *Chapman*, the "clearly established Federal law" which the federal court must apply to the error is the same "clearly established Federal law" which the state court refused to apply – namely, the *Chapman* standard. *See, e.g., Barker v. Yukins*, 993 F.Supp. 592, 602 and n.7 (E.D. Mich. 1998); *Nevers v Killinger*, 990 F.Supp. 844, 869 (E.D. Mich. 1998). *See Bryson v. Ward*, 187 F.3d 1193, 1210 (10th Cir. 1999) (Briscoe, J., concurring) ("[T]he *Brecht* standard is inapplicable to post-AEDPA cases. . . . [W]e must determine whether the [state court] reasonably applied the harmless error standard outlined in *Chapman v. California*. . . . ") Some courts have agreed

that section 2254(d) requires federal courts to determine if the state decision is contrary to *Chapman*, although anomalously suggesting that *Brecht* may be a proper yardstick in making this determination. *See, e.g., Barker v. Yukins*, 199 F.3d 867, 872 at n.4 and 874 (6th Cir. 1999); *Nevers v. Killinger*, 169 F.3d 352, 371 (6th Cir. 1999). Still other courts have simply noted that whether the prejudice inquiry should be carved out for different treatment under section 2254(d) is an open question. *Bryson v. Ward*, 187 F.3d at 1205, n.10.

There is no reason to carve out prejudice inquiries for different treatment under section 2254(d). It could not have been the intent of Congress to treat state courts which faithfully applied the *Chapman* test in the first instance identically to state courts that failed or refused to apply this well-established precedent. Such an interpretation is squarely contrary to the entire tenor of AEDPA, which requires some enhanced level of deference to state courts which make good faith attempts to apply controlling federal law. Nothing in the panel majority opinion below justifies deferring to a state court judgment which completely fails to even apply the controlling federal law.

Most important for current purposes, (1) there is a widening split of authority on this issue throughout the country and (2) the appropriate standard of prejudice to be applied in habeas cases is an issue which recurs in many habeas cases brought in the federal courts. Because this is an important and recurring issue on which there is a need for uniform treatment of litigants, certiorari is appropriate.

II.

CERTIORARI MUST BE GRANTED TO RESOLVE A SPLIT OF AUTHORITY IN THE CIRCUITS AS TO WHETHER A STATE MAY BENEFIT FROM THE MORE LENIENT *BRECHT* STANDARD OF PREJUDICE EVEN WHERE IT REFUSES TO APPLY THE MORE RIGOROUS *CHAPMAN* STANDARD ON DIRECT REVIEW.

As all members of the panel agreed, the state courts here almost entirely refused to apply the *Chapman* standard of prejudice to the constitutional errors in this case. *Bains v. Cambra*, 204 F.3d at 974 (majority) and 982 (dissent). The panel majority nevertheless applied the more deferential *Brecht* standard in assessing prejudice from these errors. Even if prejudice inquiries should be treated differently under section 2254(d), there is still a compelling reason to grant certiorari in this case.

In *Brecht*, the Court reasoned that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless error review that *Chapman* requires state courts to engage in on direct review." *Brecht v. Abrahamson*, *supra*, 507 U.S. at 636. Yet under *Brecht*'s reasoning, where state courts have **not** applied *Chapman* to a constitutional error, it is entirely appropriate for federal courts to apply *Chapman*; otherwise, states would be free to deprive defendants entirely of their right to review under the proper standard without consequence of any kind. *Cf. Roy v. California*, 519 U.S. 2, 5 (1993) (applying *Brecht* where "the state courts in this case applied [*Chapman*] harmless-error analysis. . . . ")

As noted in both the majority and dissent in petitioner's case, federal courts around the country are split on this issue. The cases fall into three categories. First, a number of courts, primarily in the Eighth Circuit, have focused on the policy of comity on which *Brecht* was based and have held *Brecht* **inapplicable** where the state courts have refused to apply *Chapman* in the first instance. In this situation, *Chapman* is still the appropriate standard to be applied. *See, e.g., Harrington v. Iowa*, 109 F.3d 1275, 1279 (8th Cir. 1997); *Cox v. Norris*, 133 F.3d 565, 572 (8th Cir. 1997); *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1631 (1994); *Lyons v. Johnson*, 912 F.Supp. 679 (S.D.N.Y. 1996) (same); *Rickman v. Dutton*, 864 F.Supp. 686, 712 (M.D. Tenn. 1994).

Courts in the Third, Fourth, Sixth and Seventh Circuits have reached a contrary view, applying *Brecht* even when the state courts have refused to apply *Chapman*. *Hassine v. Zimmerman*, 160 F.3d 941, 951 (3d Cir. 1998); *Sherman v. Smith*, 89 F.3d 1134, 1141 (4th Cir. 1996); *Gilliam v. Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999); *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995).

Courts in the Fifth and Tenth Circuits are conflicted. Early cases in both circuits held that the state gets the benefit of *Brecht* even where the state courts refused to apply *Chapman* in the first instance. *Hogue v. Johnson*, 131 F.3d 466, 499 (5th Cir. 1997); *Castro v. Oklahoma*, 71 F.3d 1502, 1515-1516 and n.14 (10th Cir. 1995). More recent panels in both circuits have recognized that although the law of the circuit doctrine binds them, such an approach to harmless error is inconsistent with *Brecht*. *See Barber v. Johnson*, 145 F.3d 234, 236-237 (5th Cir. 1998); *Crespin v. New Mexico*, 144 F.3d 641, 649 n.9 (10th Cir. 1998).

This Court has denied certiorari in many of these cases – on all sides of the issue. *See, e.g., Orndorff v. Lockhart*, 998 F.2d 1426, *cert. denied*, 114 S.Ct. 1631 (denying certiorari where federal court held *Brecht* **inapplicable** absent *Chapman* review in state court); *Sherman v. Smith*, 89 F.3d 1134, *cert. denied*, 519 U.S. 1091 (denying certiorari where federal court held *Brecht* **applicable** absent *Chapman* review in state court); *Barber v. Johnson*, 145 F.3d 234, *cert. denied*, 119 S.Ct. 518 (denying certiorari where federal court, bound by prior Circuit precedent to hold *Brecht* applicable absent *Chapman* review in state court, nevertheless concluded this result was inconsistent with *Brecht*). In petitioner's case, a divided panel embraced the view followed by initial panels in the Fifth and Tenth Circuits, holding that even where the state courts refuse to apply *Chapman*, the state will benefit from the more lenient *Brecht* standard in federal habeas. *Bains v. Cambra*, 204 F.3d at 977.

Yet as the Fifth Circuit noted in *Barber*, it is the Eighth Circuit's view which promotes the policy on which both federal habeas corpus and *Brecht* are based. The major purpose of habeas corpus is to provide an "additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Teague v. Lane*, 489 U.S. 288, 306 (1989). Allowing federal courts to apply *Chapman* when state courts have failed or refused to do so provides a strong incentive for state courts to apply "established constitutional standards." A contrary result – precluding federal courts from *Chapman* review even where state courts refused to apply *Chapman* in the first

instance – would undercut any incentive for applying *Chapman* in state court.

Indeed, as *Barber* recognized, it is the Eighth Circuit's approach which furthers the policy on which *Brecht* was based. *Brecht* was premised on principles of comity and the view that state courts were just as capable of applying *Chapman* as federal courts. *Brecht*, 507 U.S. at 636. As such, it is not "logical" to require federal courts to perform the same analysis. 507 U.S. at 636. But *Brecht* presumed a defendant had at least one court applying the correct constitutional analysis. Neither comity, *Brecht*, nor common sense require deference to a harmless error analysis which the state courts have never performed. *See Barber v. Johnson, supra*, 145 F.3d at 236-237.

In any event, and putting aside the merits of the issue, identifying the appropriate standard of prejudice is of exceptional importance in habeas litigation throughout the country. The Court's denial of certiorari in cases on both sides of the issue has left a stark and irreconcilable conflict in the federal circuits. To ensure that the rules which govern the circuits on this recurring issue are uniform, and to ensure that a habeas litigant's right to relief depends on the merits of the case rather than the jurisdiction he or she happens to be in, certiorari should finally be granted on this issue.

III.

CERTIORARI MUST BE GRANTED TO DECIDE WHETHER A SUSPECT WHO ACCOMPANIES POLICE TO THE POLICE STATION CAN EVER SUBSEQUENTLY BE DEEMED "IN CUSTODY" FOR PURPOSES OF *MIRANDA* WITHOUT SPONTANEOUSLY TRYING TO LEAVE THE STATION OR REQUESTING COUNSEL.

Within a few months of the homicide of which petitioner was accused, the police executed a search warrant at petitioner's home. In support of the search warrant, the investigating detective filed an affidavit, which concluded that "[f]rom the totality of the above facts and circumstances, I believe that [petitioner] and Rafael P. Hidalgo were involved in the murder of [the victim]" and that petitioner "hired Rafael P. Hidalgo . . . to murder" the victim.

Petitioner was at his home when police served the warrant, and he was given a copy of the warrant and the supporting affidavit. After the search, petitioner went to work. Within hours, police arrived there as well and began questioning him. Eventually, although he was not formally arrested, petitioner agreed to go to the police station for more questioning.

Almost at the outset of the questioning at the police station, petitioner was told that Mr. Hidalgo (the other suspect mentioned in the search warrant affidavit) had been interrogated and had "pointed a finger at you." Petitioner was asked why Hidalgo "pointed a finger to other people including you?" Petitioner was told that

Hidalgo "has implicated you." These statements were all false.

The investigating officer joined the interrogation, as did a police polygraph examiner. The interrogation lasted six hours, and throughout its course, each of the four officers who now confronted petitioner claimed again and again that Hidalgo had implicated petitioner in the murder. After about four hours, petitioner requested an attorney; this request was ignored. When petitioner said that he wanted to go, an officer told him that "[y]ou're not ready to go anywhere yet." The interrogation continued for two more hours. At no time were *Miranda* warnings given.

At trial, the state conceded it could not introduce in its case-in-chief the statements elicited **after** police ignored petitioner's request for counsel. However, the state was allowed to introduce every statement petitioner made **prior** to his request for counsel, the trial court ruling that *Miranda* warnings were not required at the beginning of the interrogation. This ruling was summarily upheld by the state appellate courts.

Petitioner sought federal habeas relief. In federal court, there was no dispute petitioner knew that (1) police believed he was responsible for murder, having searched his house pursuant to a search warrant and having explicitly accused him of complicity in murder in the search warrant affidavit, (2) police thereafter sought him out for questioning at work, (3) police brought him to an interrogation room at the police station, (4) police assigned multiple officers to interrogate him, and (5) from the outset, these officers repeatedly told him that he

had been implicated in the murder by the actual killer. Nevertheless, a panel majority of the Ninth Circuit held that the challenged evidence had been properly admitted. *Bains v. Cambra*, 204 F.3d at 972-73.

In support of its conclusion, the majority below relied on just two points. It pointed out that petitioner did not involuntarily accompany the officers to the police station (which petitioner had not contested). 204 F.3d at 973. It then concluded that no reasonable person "would have felt he was not free to terminate the police interrogation, at least until the first time that [petitioner] requested to speak with a lawyer and with his wife and to leave the police station and had his requests denied." *Ibid.* This was so, the majority reasoned, because "admittedly targeted questioning solely by virtue of occurring at a police station does not constitute a custodial interrogation sufficient to trigger the requirements of *Miranda*. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (per curiam)." 204 F.3d at 973.

The majority's observation about *Mathiason* is true, but irrelevant to this case. Petitioner was not in "custody" solely by virtue of the location of the "targeted questioning," but because of its circumstances and substance. The majority below ignored both the circumstances and substance of the questioning because it believed that "admittedly targeted questioning [that] occur[s] at a police station" simply "does not constitute a custodial interrogation sufficient to trigger the requirements of *Miranda*."

This is a fundamental misreading of *Mathiason*. *Mathiason* did not hold that "targeted questioning" by police involving a direct accusation of involvement in

crime, no matter what the surrounding circumstances, the type of crime it relates to, how often the accusation is repeated or how many officers make it, is irrelevant to the question of custody. Such a reading makes no sense whatever. If multiple officers are repeatedly accusing a person they are questioning of involvement in murder, no reasonable person in that situation would feel free to terminate the interrogation and leave the area.

Even less does it make sense that a suspect has to ask for a lawyer, make an effort to leave, or resist the questioning in order to be entitled to *Miranda* warnings, particularly when (as the prosecutor so crudely pointed out to the jury) the suspect is not part of "the American culture" (RT 3650) and has no prior record. These sorts of self-protective actions are the very things that *Miranda* warnings are designed to make the suspect aware of. To hold, as the majority did below, that some such action must be taken in order for *Miranda* warnings to be given is to require the student to know the lesson before it is taught.

Even if the panel majority's misreading of *Mathiason* constituted the view of a single aberrant circuit, certiorari would be appropriate to ensure that the entire Ninth Circuit did not labor under this same view. But the panel majority below is **not** alone in its view of *Mathiason*. At least one other circuit has agreed that where a defendant voluntarily accompanies police to a police station, the circumstances surrounding a subsequent interrogation are irrelevant to determining whether the suspect is in custody. *See United States v. Hunerlach*, 197 F.3d 1059, 1066 n.8 (11th Cir. 1999) (characterizing *Mathiason* as having "held [that] when a defendant's attendance at a meeting

is voluntary, the meeting is not a 'custodial interrogation' for the purposes of triggering . . . the *Miranda* warnings"). Most jurisdictions do not read *Mathiason* to create a per se rule, instead opting for a totality of the circumstances test. *See, e.g., Tankleef v. Senkowski*, 135 F.3d 235, 240, 243-244 (2nd Cir. 1998); *United States v. Salvo*, 133 F.3d 943, 948 (6th Cir. 1998); *United States v. Glover*, 104 F.3d 1570, 1578 (10th Cir. 1997); *Feltrop v. Bowersox*, 91 F.3d 1178, 1181 (8th Cir. 1996); *United States v. Jones*, 21 F.3d 165, 170 (7th Cir. 1994).

Certiorari should be granted to apply *Mathiason* in the reasonable and limited manner that it was intended and resolve this split of authority.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CLIFF GARDNER*
RICHARD C. NEUHOFF

*Counsel of Record

APPENDIX A

(Cite as: 204 F.3d 964)

United States Court of Appeals,
Ninth Circuit.

Surinder BAINS, Petitioner-Appellant,

v.

Steve CAMBRA; James H. Gomez, Director,
Respondents-Appellees.

No. 98-17223.

Argued and Submitted Sept. 15, 1999.
Decided March 2, 2000.

Clifford Gardner, Gardner & Derham, San Francisco, California, for the petitioner-appellant.

Herbert F. Wilkinson, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

Appeal from the United States District Court for the Northern District of California; Fern M. Smith, District Judge, Presiding. D.C. No. CV-97-02906- FMS.

Before: CHOY, CANBY, and SILVERMAN, Circuit Judges.

Opinion by Judge CHOY; Concurrence by Judge SILVERMAN; Dissent by Judge CANBY.

CHOY, Circuit Judge:

California state prisoner Surinder Bains ("Bains") appeals from the district court's denial of his habeas corpus petition. Having been convicted of first degree

murder with the attendant special circumstance that the murder had been committed after lying in wait, Bains filed his petition alleging violations of his due process, equal protection, Sixth Amendment, and Fifth Amendment rights. For the reasons below, we affirm the district court's decision.

Factual and Procedural Background

In 1982, Bains's sister Balbinder Bains traveled to India in order to find a husband of the Sikh faith. Eventually, Bain's family and the family of Gurmeet Shergill ("Shergill") arranged for Bains's sister and Shergill to be married. Although Shergill initially expressed some reluctance to marry Bains's sister, he ultimately agreed to do so, and the two were married in India before returning to the United States. In 1983, Bain's sister gave birth to a son, Victor.

In 1984, Shergill started dating a different woman, and soon thereafter, he separated from Bain's sister. In 1986, he and Bain's sister were divorced. During this time, Shergill moved into a studio apartment, the location of which he tried to keep a secret from the Bains family. Despite Shergill's efforts to avoid the Bains family, they located his studio apartment and made several uninvited visits during which they threatened to harm Shergill (both before and after he obtained a divorce from Bains's sister). In early 1990, Shergill retained an attorney in order to resolve a dispute with Bains's sister over child support, child custody, and the ownership of a house in Sacramento.

In August of 1990, Shergill traveled back to India. On September 1, 1990, he telephoned his son from there. The next day, having discovered Shergill's whereabouts, wanting to find out whether Shergill had traveled to India in order to find a new wife, and hoping to renew her relationship with Shergill, Bains's sister visited Jaswinder Singh ("Singh"), Shergill's childhood friend. During the visit, Bains's sister mentioned to Singh that Bains had said that Shergill might be killed if he were to remarry.

On September 12, 1990, while Shergill was still in India, a resident of Shergill's apartment complex saw a man sitting in a car that was parked in her parking stall, which was located directly behind Shergill's stall. The resident asked the man to move his car out of her parking stall, and the man then drove away. The description of the man matched that of Rafael Hidalgo ("Hidalgo"), the man who ultimately would be convicted of murdering Shergill.

On September 13, 1990, while Shergill was still in India, another resident of Shergill's apartment complex saw a man standing in the carport and bending down to look at car license plates. The man seemed to be most interested in a red Acura, the same type of car that Shergill drove. The description of the man and his car matched that of Hidalgo and his car, although with slight differences.

Later that evening, at 7:32 p.m., according to the phone records from Shergill's apartment, someone made a one-minute phone call to Bains's house from the phone inside Shergill's apartment. At that moment, Shergill,

having just returned from India, was at the airport. Scratch marks on the doorknob of Shergill's apartment door were consistent with those that would have been left if someone had picked the lock.

On September 18, 1990, another resident of Shergill's apartment complex saw an unfamiliar man standing near the door of Shergill's apartment. Upon noticing her, the man quickly walked away. The description of the man matched that of Hidalgo.

At 8 p.m., on September 23, 1990, neighbors of Shergill, a husband and his wife, heard scuffling, loud talking, and then a sudden scream originating from the carport area. They then saw three men running from the carport area. The description of one of the men matched that of Hidalgo. After seeing the three men flee, the husband immediately telephoned for emergency assistance and then went to investigate what had happened. He found Shergill lying on the ground and covered in what seemed to be blood. Shergill said that he had not been robbed and then mumbled something about three strangers.

During the same period of time, two other neighbors of Shergill heard a few screams and then saw three men leaving the carport area. The description of one of the men matched that of Hidalgo. Moreover, another neighbor also heard several screams and then saw at least two men fleeing the carport area. At least one man entered a car, the description of which matched that of Hidalgo's car.

By the time the police arrived, Shergill was unconscious, and about an hour later, he died. The autopsy of Shergill's corpse revealed a cut and four blunt traumas to

his head, and two deep stab wounds in his chest. Shergill's hands and forearms had defensive-type wounds on them.

The police investigation of the crime scene recovered, among other things, a knife and a hammer, both of which could have inflicted the wounds suffered by Shergill. Although the two possible murder weapons did not have any usable fingerprints on them, the driver's door frame and window of Shergill's car did have Hidalgo's fingerprints on them. Moreover, tire tracks found near the crime scene matched those of Hidalgo's wife's car. Furthermore, Hidalgo's wife's car had several blood stains inside it, although none of the blood found matched that of either Shergill or Hidalgo.

On July 31, 1991, the police searched Bains's residence pursuant to a search warrant. They located, among other things, two phone ledgers containing the phone numbers for Hidalgo's home and office and his twin brother's home. They also found evidence of several phone calls: calls between Bains's residence and workplace and the homes of Hidalgo and his twin brother; calls from Bains's residence to Shergill's apartment; and of particular note, as mentioned above, a call from Shergill's apartment to Bains's residence at a time when Shergill was still at the airport. Moreover, the police uncovered a check for $200 that had been dated July of 1990, signed by Bains's wife, and deposited by Hidalgo.

Later, after approaching Hidalgo, but before placing him in custody, the police permitted him to call his home. Without letting Hidalgo know, the police recorded his phone call. During the phone call, Hidalgo said, "The

person where we got the $200, tell them you don't know that person."

On the same day that the police searched Bains's residence, they arrived at Bains's workplace to ask him a few questions. Bains and the police then traveled to the police station and entered an unlocked interview room.[1] Once there, the police deceitfully told Bains that Hidalgo, upon being interviewed, had implicated Bains in the murder of Shergill. The police (three police officers and one polygraph examiner) then continued to question Bains for about six hours. Despite his eventual requests to speak with a lawyer and with his wife and to leave the police station, the police did not read Bains his Miranda rights until about four hours had passed, and they did not permit him at any time either to leave or to make any phone calls.

When he was being interviewed, Bains first claimed that he had been in contact with Hidalgo only while working overtime with him at the Maxim Corporation. Bains also originally claimed that he did not know Hidalgo's family or their phone numbers and that he had never loaned any money to Hidalgo. However, Bains later admitted several facts: he had spoken to Hidalgo after leaving the Maxim Corporation because Hidalgo had

---

[1] The parties dispute whether Bains or the police first suggested that questioning continue at the police station. However, the district court felt that regardless of which party made the suggestion first, the real question is whether Bains was coerced into going to the police station – a question that the state trial court had answered in the negative by finding that even if the police had made the suggestion first, Bains did not object to the suggestion.

been looking for a new job; he actually did know Hidalgo's twin brother and his home phone number and possibly Hidalgo's home phone number; and he had met with Hidalgo recently when Hidalgo had shown up at Bains's new place of employment in order to fill out a job application. Ultimately, Bains admitted that he and Hidalgo's twin brother were friends and that he had both brothers' home phone numbers. Yet, Bains still refused to admit that he had spoken with Hidalgo during the week before the murder of Shergill or that he had any idea why Hidalgo had implicated him in the murder of Shergill.

In addition, Bains made statements about his family being upset over the current situation between Shergill and Bains's sister and about his family's attempts, including his own attempts, to speak with Shergill and Shergill's family about the current situation between Shergill and Bains's sister. Bains also made several statements about the strength of his Sikh beliefs and his duty to support his sister after her divorce. Bains seemed to say at first that he thought that Shergill had been murdered because of the divorce and that he did not know and had never asked how or where Shergill had been murdered. Yet, Bains later admitted to knowing where the murder had occurred.

Quite significantly, Bains made all of these statements before agreeing to be subjected to a polygraph test, and he requested to speak with a lawyer and with his wife and to leave the police station only after he had been informed that the results of the polygraph test had indicated that he had not been telling the truth.

At trial, the aforementioned witnesses and police officers testified about all of these events. The state trial court, however, concluded that Bains had been "in custody" for the purpose of triggering the Miranda requirements only after the first instance that he had requested to speak with a lawyer and with his wife and to leave the police station and had been denied his request. The state trial court therefore excluded all of the statements made by Bains after that time but admitted all of the statements made before that time.

A paid police informant, Raymond Delgado ("Delgado"), testified that he had befriended Bains while the two of them were in jail. Delgado claimed that Bains had confessed that he had hired someone for $30,000 to murder the husband of a family member because the family member was having child support and child custody problems with her husband. Delgado also claimed that Bains had told him that the hired killer had followed the family member's husband to his home from a fast food restaurant and then had stabbed him. However, at trial, Bains's lawyer presented considerable evidence to impeach Delgado's testimony: Delgado had stated that he was offering the information about Bains in order to ensure his admission into the federal witness protection program; Delgado had been reviewing court files in other people's cases and had been inquiring about Bains's case; and Delgado's testimony almost mirrored the contents of previously published news articles, including the factual errors contained within them (e.g., the number of children that Shergill and Bains's sister had, the amount of money that had been paid for the murder, and the manner in which the hired killer had stalked Shergill).

Presumably motivated by the impeachment of Delgado's testimony, the state prosecutor said during the closing argument, "You can take Mr. Delgado's testimony and put it completely aside and examine what's left and you still have the same convincing showing of Mr. Bains's participation in this crime."

The prosecutor then presented evidence of several threatening statements made to Shergill by members of Bains's family. Bains's mother had issued a traditional threat to Shergill that he "should receive beating by shoes in the head." Bains's aunt had threatened Shergill by saying that he would not be allowed to live in the United States or in India if he divorced Bains's sister. Singh testified that Bains's sister had said that Bains had said that if Shergill returned from India with a new bride, then he would be killed. The trial court admitted such evidence as hearsay that under California law fell within the hearsay rule exception for statements made by co-conspirators.

In addition, the prosecutor presented the testimony of Shergill's mother, father, friends, and divorce attorney, all of whom suggested that Shergill was in fear for his safety because of the threats of Bains's family. The trial court admitted such evidence as hearsay that under California law fell within the hearsay rule exception for state-of-mind evidence.

Several other witnesses for the prosecution testified about the beliefs and customs of the Sikh community so far as marriage and divorce were concerned. These witnesses explained that Sikh families take the institution of marriage very seriously and feel very strongly that a

husband must comply with his half of the marriage contract, especially since if a husband leaves his wife, his wife is considered to be "damaged goods" and an "unmarketable commodity," thereby causing the families of both spouses great hardship.

Along these same lines, Officer Johl ("Johl") of the Sutter County Sheriff's Department was qualified and accepted by the trial court as an expert in the Sikh religion and its practices. Johl testified that in the Sikh community, when a husband in an arranged marriage unilaterally decides to divorce his wife, the family of his wife, especially its male members, would attempt to bring the pair back together, and if the attempt at reconciliation failed, would attempt to exact "violent revenge or retribution" in order to save face. Johl also testified that "such escalation was not predictable or inevitable" and that "Sikhs are no more violent than anyone else" (as paraphrased by the California Court of Appeal).

During his closing arguments, the prosecutor emphasized these generalizations about followers of the Sikh faith and stated, among other things, "If you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence," and "What you don't understand, what Mr. Bains did understand and wanted Gurmeet to understand, was the laws in the United States is [sic] not what we're talking about. We're playing this game by Sikh rules." Moreover, the prosecutor emphasized the statements that Bains had made to the police regarding the strength of his belief in the Sikh faith and in the wrongness of Shergill's conduct toward Bains's sister.

The jury deliberated for eighteen hours over the course of four days before deciding to convict Bains.

The California Court of Appeal affirmed the trial court's decision and reached the following conclusions: (1) the hearsay evidence of Shergill's fear of some violent retribution by Bains's family should not have been admitted; (2) the hearsay evidence of Bains's family's statements that violent retribution might be visited upon Shergill should not have been admitted, with the exception of the hearsay evidence of Bains's sister's statement to Singh about Bains's statement, which properly was admitted under the exception for a co-conspirator's statements; (3) the evidence of Sikh attitudes and values toward marriage and divorce properly had been admitted to demonstrate possible motive and intent of Bains to commit the murder, but the evidence of a propensity of the general Sikh individual to use violence in specific situations should not have been admitted; and (4) despite the numerosity of the errors that occurred at trial, all of the errors taken together were harmless in light of the other evidence against Bains. Contrary to the apparent assumptions of both the federal district court and both of the parties, the California Court of Appeals expressly found that the admission of the propensity evidence was not an error of constitutional magnitude, and by applying the Watson harmless error standard[2] rather than the

---

[2] The *Watson* harmless error standard is the standard applied by the California state appellate courts in reviewing non-constitutional magnitude, trial type errors. *See*, e.g., *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243, 254 (1956). In applying the *Watson* standard, California state appellate courts determine whether "it is reasonably probable that a result more favorable

Chapman standard[3] in evaluating the issue, impliedly found the admission of the hearsay evidence of Shergill's fear was not an error of constitutional magnitude.

In his state habeas corpus petition filed in the California Supreme Court, Bains raised a claim that a Miranda violation had occurred during his questioning by the police. Instead of dismissing such claim on procedural grounds, the California Supreme Court issued a denial "on the merits" of Bains's entire appeal without providing any written explanation of the denial.

After considering Bains's § 2254 habeas corpus petition, the district court tentatively granted the petition. In its tentative decision, the district court, believing that there was no state court determination of the issue and that de novo consideration therefore was appropriate, held that a Miranda violation had occurred (without considering whether Bains's interrogation by the police could be divided into two sections-one before Bains had requested to speak with a lawyer and his wife and to

---

to the appealing party would have been reached in the absence of the error." *See*, e.g., *id.* This standard under California state law is the equivalent of the *Brecht* standard under federal law, to wit, whether the errors had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " *Henry v. Estelle*, 33 F.3d 1037, 1041 (9th Cir.1993), rev'd sub nom on other grounds, *Duncan v. Henry*, 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 636-38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

[3] The *Chapman* standard is a "harmless beyond a reasonable doubt" standard applied (at least for direct appeals) by all courts (state and federal) in reviewing constitutional magnitude, trial type errors. *See*, e.g., *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

leave, and one after). The district court then concluded that Bains's statements to the police therefore should have been suppressed in their entirety, viewed in the aggregate, the numerous errors that had occurred at trial were not harmless.[4]

In its final decision, having noticed that after a pretrial hearing, the state trial court actually had determined for itself that Bains had not been subjected to a custodial interrogation prior to his first requests, the federal district court denied the petition. The district court reached several conclusions: in light of the considerable deference that it owed to the state trial court's "essentially factual determination," Bains had not been "in custody," and no Miranda violation had occurred prior to Bains's first request to speak with a lawyer and with his wife and to leave the police station; no suppression of Bains's statements made prior to his first requests therefore was necessary; and in the final analysis, the state appellate court's conclusion as to the harmlessness of the errors that had occurred at trial was not unreasonable under federal law.

After considering Bains's motion to alter or amend the judgment, the district court amended its final decision by removing the section discussing the state court's

---

[4] The district court seemingly assumed that the numerous errors that had occurred at the trial level were of constitutional magnitude (and therefore were reviewable as matters of federal law). Yet, the district court never really came right out and said as much. However, in its issuance of the certificate of appealability, the district court did suggest that it considered the errors to have been of constitutional magnitude.

determination as to whether Bains had been "in custody." The district court left intact the section noting that the state trial court's treatment of the Miranda issue was not erroneous because the trial court properly had excluded the statements made by Bains following his first request to speak with a lawyer and with his wife and to leave the police station. Moreover, the district court made additional observations: the California Court of Appeal had performed its harmless error review under both the *Watson* and the *Chapman* standards; the district court had performed its own harmless error review under the *Brecht* standard and had concluded for itself that the errors that had occurred at trial were harmless; and because the California Court of Appeal already had performed its harmless error review under the *Chapman* standard, the federal district court did not need to perform its own harmless error review under that much more exacting standard.

Discussion and Analysis of Law

I. General Standards of Review.

A federal court will not grant a habeas corpus petition on the basis of any claim that was decided in a state court unless the state court's adjudication of that claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). In reviewing such a petition, a

federal court is bound by the state court's interpretations of state law. *See*, e.g., *Wainwright v. Goode*, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983). A federal court must presume the correctness of the state court's factual findings. *See* 28 U.S.C. § 2254(e)(1).

II. Absence of Any Statements To Be Suppressed (Miranda Issue).

The critical inquiry here is not whether a Miranda violation occurred but rather when it occurred. An individual is "in custody" at the point a reasonable person would feel that he was not free to terminate the interrogation. *See*, e.g., *Thompson v. Keohane*, 516 U.S. 99, 111-12, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The district court concluded that the "in custody" inquiry was " 'essentially a factual determination' " (citing *Medeiros v. Shimoda*, 889 F.2d 819, 822 (9th Cir.1989) and *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir.1981)), and thus seemingly afforded a high level of deference to the state trial court's determination of this issue. The Supreme Court in *Thompson*, 516 U.S. at 111-12, 116 S.Ct. 457, however, held that the inquiry is really a mixed question of law and fact, which is subject to de novo review by appellate courts. While the ultimate issue of when Bains was "in custody" is subject to de novo review, the state trial court's answers to the "scene-and action-setting questions" (i.e., the underlying factual questions) still are entitled to a presumption of correctness. *See*, e.g., *id.*

In the present case, the state trial court determined that, as a factual matter, either Bains himself suggested that his questioning by the police continue at the police

station or he simply chose not to object when the police suggested that his questioning continue at the police station. In either event, according to the state trial court's determination, Bains was not "coerced" into going to the police station and instead "voluntarily" accompanied the police to the police station. While this determination is not decisive of the ultimate "in custody" issue, it nevertheless must be presumed to be correct so far as setting the scene and reconstructing Bains's and the police's lines and actions are concerned. *See*, e.g., *id.*

There is no evidence here to suggest that, under clearly established federal law, a reasonable person in Bains's situation would have felt that he was not free to terminate the police interrogation, at least until the first time that he requested to speak with a lawyer and with his wife and to leave the police station and had his requests denied by the police. Although Bains was questioned by several police officers, who in fact had lied to him about whether Hidalgo actually had made incriminating statements about him, such admittedly targeted questioning solely by virtue of occurring at a police station does not constitute a custodial interrogation sufficient to trigger the requirements of Miranda. *See*, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 495-96, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam). At the very least, the state courts' (i.e., the trial court's and the California Supreme Court's) determinations that no Miranda violation occurred until after Bains first had made his requests, cannot be said to have been so erroneous that they can be said to have resulted "in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the

Supreme Court of the United States." Therefore, since all of the relevant self-incriminating statements made by Bains to the police were made prior to his first requests (and thus prior to the occurrence of any Miranda violation), we hold that their introduction at trial was permissible.

III. Three Constitutional Magnitude, Trial Type Errors.

A. Testimony as to Shergill's State of Mind (Hearsay Evidence).

The Sixth Amendment Confrontation Clause, applicable to state prisoners through the Fourteenth Amendment, requires that in order to introduce relevant statements at trial, state prosecutors either produce the declarants of those statements as witnesses at trial or demonstrate their unavailability. *See*, e.g., *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Moreover, in the event that state prosecutors successfully demonstrate the declarants' unavailability, they still must show that the hearsay statements sought to be introduced bear some adequate indicia of reliability, for example, by falling within a firmly rooted exception to the hearsay rule. *See*, e.g., *White v. Illinois*, 502 U.S. 346, 356, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

In the present case, the California Court of Appeal impliedly concluded that the admission of the hearsay evidence of Shergill's fear that Bains's family might try to hurt or kill him was not error of constitutional magnitude, and the district court seems to have only assumed as much. This error, however, violated Bains's Sixth

Amendment right to confront the witnesses against him. The prosecutor did not and quite obviously could not produce Shergill, the murder victim, as a witness at trial. Moreover, as the California Court of Appeal concluded as a matter of state law, and as we find to be correct as a matter of federal law, evidence of Shergill's beliefs about the Bains family's intentions toward him was not admissible under the exception to the hearsay rule for statements of the declarant's state of mind (or any other exception) in order to prove the truth of those beliefs. *See*, e.g., Fed.R.Evid. 803(3); *United States v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir.1994). Thus, under clearly established federal law, we hold that the admission of such hearsay evidence clearly violated Bains's Sixth Amendment right to confront the witnesses against him. *See*, e.g., *id.*

B. Testimony as to Threats Made by Bains's Family (Hearsay Evidence).

In the present case, the California Court of Appeal concluded that with the exception of Singh's testimony as to the threats made by Bains that were relayed to her by Bains's sister, the admission of the hearsay evidence of the threats made by Bains's family was an error of constitutional magnitude. The district court seems to have agreed, and we also agree with this assessment. There is no indication that the prosecutor produced any member of Bains's family as a witness at trial. Moreover, as the California Court of Appeal concluded as a matter of state law, and as we find to be correct as a matter of federal law, the statements of Bains's family (with the exception of those made by Bains's sister to Singh) were not made

during the course of, and in furtherance of, a conspiracy and were not admissible under the exception to the hearsay rule for statements made by a co-conspirator. *See*, e.g., *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Thus, under clearly established federal law, we hold that the admission of such hearsay evidence clearly violated Bains's Sixth Amendment right to confront the witnesses against him. *See*, e.g., *id.*

C. Appeals to Racial, Ethnic, and/or Religious Prejudice.

Most of the relevant testimony presented, and the closing arguments made, by the prosecutor involving the beliefs of the adherents of the Sikh religion only were provided to explain the Sikh beliefs concerning marriage and divorce and thereby only were provided to offer a potential motive and to show a clear intent of Bains to have murdered Shergill. A not insignificant portion of the prosecutor's closing arguments, however, highlighted the relevant testimony in a way that went beyond merely providing evidence of motive and intent (i.e., without limiting his generalizations about Sikh persons as Officer Johl did at the end of his own testimony) and that invited the jury to give in to their prejudices and to buy into the various stereotypes that the prosecutor was promoting.

It is evident under clearly established federal law that this very kind of conduct by a prosecutor (to the extent that it involves either race or ethnicity) violates a criminal defendant's due process and equal protection rights. *See*, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (noting that "the

Constitution prohibits racially biased prosecutorial arguments"); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir.1975); *Fontanello v. United States*, 19 F.2d 921, 921-22 (9th Cir.1927); *see* also *United States v. Vue*, 13 F.3d 1206, 1212-13 (8th Cir.1994) (holding that the making of prosecutorial arguments associating members of a particular ethnicity and from a particular geographic region with the commission of drug-related offenses violated the criminal defendant's constitutional rights); *United States v. Doe*, 903 F.2d 16, 21-29 (D.C.Cir.1990); *United States v. McKendrick*, 481 F.2d 152, 156-61 (2d Cir.1973) (concluding that a constitutional violation occurred when a state prosecutor's closing arguments invited the jury members to view "colored people" as an entity separate and apart from themselves).[5]

In its decision, however, the California Court of Appeal concluded that because the general beliefs of the Sikh faith already had been presented permissibly as evidence of Bains's motive and intent, the limited use by the prosecutor of concededly impermissible arguments

---

[5] It is not inconceivable that the prosecutor's discriminatory remarks against Sikh persons actually were a form of religious rather than racial or ethnic discrimination. After all, the technical definition of Sikhism is that it is an offshoot of the Hindu religion. Given the correlation between being a Sikh and being racially and ethnically Indian and the prosecutor's comparison of being an American and being a Sikh, the classification also seems to have racial and ethnic components. Moreover, although perhaps to a lesser extent, religion-based prosecutorial arguments also are prohibited under clearly established federal law. *See*, e.g., *United States v. Amlani*, 111 F.3d 705, 714-15 (9th Cir.1997) (citing several out-of-circuit authorities).

did not have any significant prejudicial effect on the jury and therefore should not be deemed to be harmful error, let alone a constitutional magnitude error at all. We disagree.[6] The circumstances of the present case are not like those of *United States v. Santiago*, 46 F.3d 885, 891 (9th Cir.1995), where a prosecutor's improper use of a potentially objectionable term (in that case, the gang name "the Mexican Mafia") for ambiguous reasons amidst an overall dispassionate and intelligent presentation was held not to be sufficiently prejudicial so as to constitute an equal protection violation. Here, the prosecutor relied upon clearly and concededly objectionable arguments for the stated purpose of showing that all Sikh persons (and thus Bains by extension) are irresistibly predisposed to violence when a family member has been dishonored ("If you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence.") and also are completely unable to assimilate to and to abide by the laws of the United States ("[T]he laws in the United States [are] not what we're talking about. We're playing by Sikh rules."). Such prosecutorial arguments were actually more a statement about the stereotypical "nature" of a particular group rather than an explanation of the beliefs followed (to different degrees and in different ways) by some members of that group.

---

[6] Moreover, as a preliminary matter, *United States v. Vue*, 13 F.3d 1206, 1212-13 (8th Cir.1994), the only case cited by the California Court of Appeal as support for this line of reasoning, does not make any mention of the proposition that the admission of permissible evidence can render the admission of otherwise impermissible evidence not merely harmless but also permissible.

The fact that much evidence already had been permissibly introduced to show Bains's motive and intent does not alleviate these concerns. Such evidence, as does most evidence, permitted several inferences to be drawn, some permissible (e.g., Bains, a particular Sikh person, may have had a motive to kill Shergill) and others impermissible (e.g., Bains, like all other Sikh persons, solely on account of his being a Sikh rather than any other kind of person, was compelled to kill Shergill). Thus, the introduction of clearly inflammatory prosecutorial arguments very well might have had the effect of motivating the jury to draw and to focus upon the impermissible inferences from the otherwise properly admitted evidence of Sikh beliefs, thereby bolstering the prejudicial effect of the prosecutorial arguments-rather than minimizing their prejudicial effect as hypothesized by the state government and the California Court of Appeal. Moreover, this danger was exacerbated by the state trial court's reluctance to issue limiting instructions to the jury as to its consideration of the expert testimony and the prosecutorial arguments relating to adherents of Sikh beliefs. *See*, e.g., *Amlani*, 111 F.3d at 714-15 (noting that the prejudicial effect of the prosecutor's arguments were contained because, inter alia, the trial court had issued limiting instructions to the jury).

IV. Harmless Error Analysis.

A. Review of the California Court of Appeal Determination.

Since the California Court of Appeal failed to recognize two errors as being of constitutional magnitude, it

necessarily also failed to select the appropriate standard in evaluating the harmlessness of those errors. To wit, by deeming two errors as being merely errors under state evidentiary law, the California Court of Appeal improperly selected the *Watson* standard rather than the *Chapman* standard in evaluating those errors.

Arguably, such improper selection would permit a federal district court to grant the habeas corpus petition with the condition that the petition would not be granted if the California Court of Appeal were to reevaluate those errors under the appropriate standard of review. *See*, e.g., *Jeffries v. Wood*, 114 F.3d 1484, 1500-01 (9th Cir.1997) (en banc) (permitting such a course of action where a state appellate court did identify an error as being of constitutional magnitude but then selected the wrong harmless error standard; noting that "the [Antiterrorism and Effective Death Penalty] Act if applied would not preclude the issuance of a writ of habeas corpus") (emphasis added). However, contrary to Bains's argument, the precedent cited by him does not support the proposition that a federal district court would be required to take such action under such circumstances, and much precedent supports the opposite proposition (i.e., that the federal district court is free to conduct its own independent review and to make its own determination). *See*, e.g., *Hanna v. Riveland*, 87 F.3d 1034, 1038 & n. 2 (9th Cir.1996) (permitting independent harmless error review by a federal district court where the state appellate courts had failed to identify a constitutional error and thus had not conducted any harmless error review). Because the federal district court here did in fact choose to conduct its own independent review of the harmlessness of the state

trial court errors, we now review the appropriateness of the federal district court's determination.

B. Independent Review by the Federal District Court.

In conducting its own independent harmless error review, erroneously believing that the California Court of Appeal had in fact applied the *Watson* and *Chapman* standards of harmless error review to all three of the errors committed at the trial level, the federal district court here applied the less stringent (i.e., in terms of being more forgiving of trial-type errors) *Brecht* standard. In *Brecht*, the Supreme Court held that a less stringent harmless error standard should be applied in 28 U.S.C. § 2254 habeas corpus cases where the state appellate court already had conducted a harmless error review (albeit in an improper manner) and the federal district court was conducting its own independent harmless error review. *See Brecht*, 507 U.S. at 636-38, 113 S.Ct. 1710. Attempting to limit the holding of *Brecht* to the particular facts of that case, and seeking to distinguish those facts from the facts of his case, Bains now argues that the more stringent *Chapman* standard should have been applied where, as here, the state appellate courts never even had an opportunity to conduct their own harmless error review (because they did not find any constitutional errors susceptible to such review). We reject this argument and affirm the district court's selection and application of the *Brecht* standard.

We previously have not decided this issue. *See*, e.g., *Hanna*, 87 F.3d at 1038 n. 2. However, as pointed out by

Bains, the Eighth Circuit and a handful of federal district courts have argued that the *Chapman* standard should be applied where, as here, the state courts simply failed to identify certain constitutional errors and thus did not have the occasion to conduct their own harmless error analyses. *See*, e.g., *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir.1993).[7] These courts have argued that the holding of *Brecht* is not applicable when there is no state court harmless error ruling to which the federal district court can defer. *See*, e.g., *id.* Moreover, these courts have held that in the absence of any express indication in *Brecht* as to whether its holding should be read broadly or narrowly, its holding should be limited to the facts that were present there (i.e., the state court had identified constitutional errors but then simply had failed to apply the proper standard for its harmless error analysis). *See*, e.g., *id.*

Yet, at last count, the Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have held that in habeas corpus cases, federal district courts always should apply the *Brecht* standard when conducting their own independent harmless error review, regardless of what, if any, type of harmless error review was conducted by the state courts. *See*, e.g., *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir.1995).[8] These courts have argued that the

---

[7] *See* also *Lyons v. Johnson*, 912 F.Supp. 679, 687-89 (S.D.N.Y.1996); *Rickman v. Dutton*, 864 F.Supp. 686, 712 (M.D.Tenn.1994).

[8] *See* also, *Hassine v. Zimmerman*, 160 F.3d 941, 951 (3d Cir.1998); *Sherman v. Smith*, 89 F.3d 1134, 1141 (4th Cir.1996); *Hogue v. Johnson*, 131 F.3d 466, 499 (5th Cir.1997); *Gilliam v. Mitchell*, 179 F.3d 990, 995 (6th Cir.1999); *Castro v. Oklahoma*, 71

language used in the *Brecht* opinion suggests that its holding should not be limited to its particular facts, especially since the specific factual pattern at issue in *Brecht* was a rather uncommon one (i.e., state courts tend more frequently simply to fail to recognize constitutional errors entirely rather than to recognize constitutional errors as such, but then to conduct improper harmless error analyses), and thus the harms sought to be avoided by implementing the *Brecht* holding would be avoided only in a very small minority of cases. *See*, e.g., *id.* Moreover, these courts also have argued that the interests laid out in *Brecht* (i.e., finality of state court convictions, comity, federalism, and prominence of the trial itself) are disserved by a reversal stemming from a federal district court decision, regardless of whether the state court's "mistake" was simply applying the wrong harmless error standard or rather failing to identify constitutional errors entirely and thus never having had the chance to conduct its own harmless error analysis. *See*, e.g., *Hassine*, 160 F.3d at 951. The fact that there was no state court harmless error ruling that would be supplanted was immaterial; what was material was that, for whatever reason, a state court conviction would be interfered with by a federal district court. Furthermore, some of those courts also have noted that judicial decision-making costs would be greatly increased by requiring federal courts to delve into the harmless error methodology used by the state courts in every case so as to determine whether the *Brecht* or the

---

F.3d 1502, 1515-16 & n. 14 (10th Cir.1995); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n. 11 (11th Cir.1995).

Chapman standard should be applied at the federal level. *See*, e.g., *Sherman*, 89 F.3d at 1141.

For the reasons listed in the preceding paragraph, we now join the vast majority of our sister circuits by deciding that the *Brecht* standard should apply uniformly in all federal habeas corpus cases under § 2254.

Turning to the district court's application of the *Brecht* standard, and having reviewed the record below, we conclude that such application was proper. As emphasized by the California Court of Appeal, and as impliedly agreed with by the federal district court, given the telephone calls linking Bains with Hidalgo and his twin brother (especially the telephone call to Bains's home from Shergill's apartment at a time when Shergill was at the airport), the check for $200 that had been drawn by Bains and had been endorsed by Hidalgo (and very likely had been alluded to by Hidalgo during his pre-arrest phone call as something the details of which should be kept hidden from the police), the self-incriminating statements (i.e., the highly suspicious lies) made by Bains to the police, and the powerful evidence of Bain's motive and intent to murder Shergill, a strong case against Bains remained even in the absence of the erroneously admitted evidence. Moreover, the errors committed here did not involve the more sensitive structural aspects of the trial, such as the use of peremptory challenges or the composition of the grand jury, such that the errors might be said to have infected the entire process and rendered any outcome necessarily suspect. *See*, e.g., *Smith v. Farley*, 59 F.3d 659, 663-64 (7th Cir.1995). Therefore, we conclude that in applying the less stringent *Brecht* standard, the district court properly did not have any "grave doubt"

about whether the errors here had "a substantial and injurious effect or influence in determining the jury's verdict." The errors that occurred at trial do not provide sufficient reason to doubt under the *Brecht* standard the district court's final conclusions as to the legitimacy of the process and the correctness of the outcome of Bains's trial.

Conclusion.

For the reasons above, we affirm the decision of the district court.

AFFIRMED.

SILVERMAN, Circuit Judge, concurring:

There is no denying that errors occurred at the trial of this case. The only issue on habeas review is whether the errors were harmless. I agree with Judge Choy's analysis of the *Brecht* issue and write separately only to emphasize the strength of the prosecution's evidence that was properly admitted.

The fingerprints of Bains's co-defendant, Hidalgo, were found on the driver's door frame of the victim's car. In addition, he had been positively identified lurking around the victim's apartment and inspecting his car. Tire tread marks connected Hidalgo's vehicle to the crime scene, as did damage to Hildago's car bumper which matched damage found at the victim's carport where the murder occurred.

Telephone records established that ten days before the murder, on the day the victim returned from India but before he arrived home from the airport, someone placed a phone call to Bains's home from the victim's apartment. The testimony strongly supports the inference that it was Hidalgo.

Bains originally told police that he barely knew Hildago and that he did not know his phone number. However, a search of Bains's residence revealed two telephone ledgers containing Hidalgo's home and workplace phone numbers, and the home phone number of Hidalgo's brother. Police also found at Bains's home a check register listing a $200 check to which Hidalgo's name had been added and that Hidalgo had endorsed – a check that Hidalgo, after his arrest, sought to conceal. In addition, telephone records established that within the ten days prior to the murder, over twenty telephone calls were placed from Bains's home to Hidalgo's home, Hidalgo's work or Hidalgo's brother, and from Bains's phone to the victim's apartment.

As the district judge found, "In light of the phone records demonstrating many calls between petitioner and Hidalgo, [Bains's] denials to the police that he had any relationship with Hidalgo were particularly damaging to his defense."

An essential ingredient of Judge Canby's thoughtful dissent is his conclusion that virtually all of Bains's statements were obtained in violation of Miranda and therefore, cannot be taken into account in the harmless error equation. It is true that without the statements, the case against Bains falls apart. However, as Judge Choy has

demonstrated – and as the district judge and the state courts also have found – the evidence amply supports the conclusion that Bains was not in custody at the time he made his incriminating statements and therefore, that Miranda did not require their suppression. The evidence is undisputed that Bains went to the police station voluntarily. He was not under arrest, in handcuffs, placed in a cell or in a locked room. Although Judge Canby makes the point that "[Bains] was not informed that he was free to leave at any time[,]" Dissent at 2293, Miranda simply does not require that the police tell suspects, "You have the right to leave."

I see no Miranda significance in the fact that "Bains had been home that morning when a search warrant was executed at his house[ ]" or that he voluntarily rode to the police station in a police car instead of driving himself. Dissent at 979. It is undisputed that Bains voluntarily agreed to go to the police station and answer questions. It is custodial interrogation that triggers Miranda's requirements, not the fact that an investigation has focused on a suspect or that he rode to the station in a police car. *See Beckwith v. United States*, 425 U.S. 341, 346-47, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).

It is true that at some point, the interrogation of Bains became custodial. The transcript of the interview is 264 pages long. At page 183, Bains asked to go home and come back the next day, a request that was denied. In my view, that is when the interrogation turned custodial.[1]

---

[1] The prosecution stipulated that it would not, and it did not, introduce any statements Bains made after page 170, when he requested a lawyer.

The fact that Bains, prior to that point, attempted to assert his desire to leave and to voluntarily return the next day clearly shows that he did not consider himself in custody, i.e., "that questioning [would] continue until he provide[d] his interrogators the answers they seek." *See Berkemer v. McCarty*, 468 U.S. 420, 438, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). And it strongly supports a finding that he was not in custody until his request to leave was denied. *See Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

Although this was not a perfect trial, I agree with Judge Choy and the district judge that it passes the *Brecht* test.

CANBY, Circuit Judge, dissenting:

With all due respect, I dissent from the majority opinion. In my view, the combination of constitutional errors committed at Bains's trial " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

In the first place, I conclude that the Miranda violation occurred at or shortly after the beginning of the questioning of Bains at the police station, and that none of his statements made during the interrogation should have been admitted in evidence.[1] The question to be answered in determining whether there is custody for purposes of Miranda is: "given th[e] circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The circumstances were that Bains had been home that morning when a search warrant was executed at his house. Police had later come to his workplace to question him, but he did not want to be questioned at work. It is not clear who suggested the police station, but in any event the police drove Bains there. At the station, he was placed in an interview room with two officers (two additional officers, one a lie detector operator, later took part). He was not informed that he was free to leave at any time. Before any substantial questioning occurred, the officers falsely informed Bains that Hidalgo, who had been arrested for the murder, had "pointed a finger" at Bains.[2] Bains had not been many years in this

---

[1] Bains raised his Miranda claim at trial and in his habeas petition to the California Supreme Court, which tersely denied the petition "on the merits." The State has not contended in the present appeal that Bains failed to exhaust his Miranda claim, or that it has been procedurally defaulted.

[2] It is true that in *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the Supreme Court stated that a false statement of incriminating evidence "has nothing to do with whether respondent was in custody for purposes of the Miranda rule." *Id.* at 496, 97 S.Ct. 711. This statement, however,

country, and he had had no prior involvement with the criminal justice system. The transcript of the interrogation reveals considerable language difficulty. I conclude that, from the beginning of the questioning, a reasonable person in Bains's position would not believe that he was free to terminate the interrogation, leave the closed-door interview room, and depart (without a car). And that reasonable person's understanding, as it turns out, would have been wholly accurate: Bains was interrogated for six hours, and was denied permission to leave or call his wife.

The state court determined that the interrogation became custodial only after Bains made a rather confused reference to an attorney and questioning continued. But the obligation to honor Bains's request for an attorney arises from Miranda, and depends upon Bains's being in custody. His mention of an attorney did not create custody; the circumstances and surroundings did. Indeed, it is difficult to re-read Miranda without concluding that Bains's interrogation is exactly the kind that Miranda had in mind when it required warnings. *See Miranda v. Arizona*, 384 U.S. 436, 449-58, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (emphasizing effect of isolation in intimidating

---

was made before the Supreme Court ruled that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Certainly a reasonable person would consider it a factor, in determining freedom to leave, that a witness had identified him or her to the police as the perpetrator of the murder that was under investigation.

surroundings of station house). From the outset, a reasonable person in Bains's position would have been "aware that questioning will continue until he provides his interrogators the answers they seek." *Berkemer v. McCarty*, 468 U.S. 420, 438, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). It was thus Miranda error for the trial court to conclude that Bains was not in custody in the station house interview room during the extensive first part of his interrogation, which extends through 170 pages of transcript.

As the majority opinion holds, and I agree, there were three additional constitutional errors committed at Bains's trial: (1) admission of hearsay testimony concerning Bains's state of mind; (2) admission of hearsay testimony concerning threats made by other members of Bains's family; and (3) argument (and, I would add, some testimony) emphasizing that violence is to be expected from Sikhs.

On the first two points, I have nothing to add to the cogent discussion in the majority opinion. With regard to the third error, I would add that testimony as well as argument went beyond constitutional bounds. A sheriff's department employee who had been raised as a Sikh testified as an expert on the Sikh culture. Bains did not object to testimony about the seriousness with which Sikhs regarded the marriage contract. He did object, however, to testimony of which the following exchange is an example:

> Q. By virtue of your own roots within the Sikh community as well as your law enforcement experience in Sutter County, are you familiar with violence, the potential for violence, generally within the Sikh community based upon cultural values?

A. Yes.

Q. Can you tell the ladies and gentlemen of the jury whether these are cultural values within the Sikh community which, if violated or perceived to be violated, can be expected to have the potential for life-threatening violence?

A. Could be a number of things, something that transpired back in India and it's carried over here to America, or could be a sour or bad marriage between the arranged marriages where the female is divorced and some type of action, I guess if you want to call it, has to be taken by the other party.

Q. I want to go in a little bit more detail, but as I understand it, at this point there are in general such as things, feuds between families which cause potential for violence to the extent that the feuds even follow the families across the ocean to the United States?

A. Yes.

Q. And with respect to the traditional Sikh values as they arose in the Punjabi [sic] and have come to the United States, are there very strong feelings among the community concerning the topic of divorce?

A. Usually is, yes.

Q. Now, especially I want to direct your attention to a situation in which there's been arranged marriage and of the two participants in the arranged marriage the wife continues to desire the marriage-wants the marriage to continue.

Under those circumstances if the husband were to decide, for whatever reason that he wanted, to terminate the marriage relationship and obtain a divorce,

> is that the type of behavior that, in your experience, could lead to violence and potentially deadly violence?
>
> A. Yes.

Although the witness later explained that violence did not always follow, the effect of this testimony is to cause the jury to focus on the proposition that, in his family situation, Bains was likely to have committed violence because he was a Sikh.

Then, in final argument, the prosecutor at several points reinforced this tendency. Among the many references to the different values and tendencies of Sikhs were the following:

> . . . [A]nyone who is familiar with the Sikh culture, especially as it's practiced by relatively conservative tradition-oriented and traditional Sikhs is going to find out that, unlike the culture here in the United States, if you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence.
>
> * * *
>
> It's a very traditional society in which those who conservatively follow its vast values and tenets can predictably be shown to-to acknowledge significance about several things. The wearing of a turban, the maintenance of a beard, and the carrying of a dagger. Was there some symbolic ritualistic meaning of the way Gurmeet Shergill was killed? Was he left dying in a pool of blood as a statement to the rest of the Sikh community by Bains? Is that a death that had significance far beyond your understanding

> as common lay persons from a cross-section of the American culture? Think about it.
>
> * * *
>
> Everybody seems to agree that this is primitive killing amidst a bunch of sophisticated preparation. That's going to remain the status of the case forever. Do you need a reasonable explanation? Other than every Sikh who reads about this case is going to understand that the Bains clan avenged their honor, they did what was expected of them.

The State does not contest the holding of the state appellate court that the references to the Sikh tendency toward violence constituted error. It argues only that the error was harmless, and the majority here agrees.

The egregiousness of the emphasis on Sikh tendencies toward violence weighs heavily in the balance, in my view. Moreover, because I conclude that Miranda was violated by admitting Bains's statements made during the interrogation, I exclude those statements from the prosecution's side of the harmless-error balancing process.[3] In the absence of those statements, in which Bains denied contact with Hidalgo, the fact that telephone calls were made between Bains and Hidalgo loses its incriminating value. The most important remaining evidence against Bains is the $200 check from his wife to Hidalgo, and the telephone call from the victim Gurmeet's house to Bains's

---

[3] I note that the district court, upon initially ruling that there had been a Miranda violation, determined that the *Brecht* standard had been met and the writ should issue. The district court changed that determination only when it reconsidered its Miranda ruling and found no violation.

residence at a time when Gurmeet was arriving at the airport. The jury, however, rejected the special circumstance of murder committed for financial gain; it apparently concluded that the $200 had nothing to do with the murder. The one-minute telephone call from Gurmeet's apartment to Bains's residence, with contents or recipient unknown, an hour before Gurmeet arrived at the airport from India and ten days before his murder, is certainly adverse but not enough to sustain a conclusion that Bains would have been convicted if all of the constitutional errors had not occurred.

The state appellate court, in finding all errors harmless, concluded that there had been no Miranda violation. It also relied heavily on the testimony of Bains's cellmate that Bains had confessed that he arranged the murder for $30,000. This testimony was even more suspect than most cellmate confessions; the cellmate's testimony was so thoroughly impeached at trial that the prosecutor partially distanced himself from it in final argument, and the jury appears to have disregarded it in finding no financial gain special circumstance with regard to the murder. The cellmate confession is entitled to no weight in the harmless error balancing.

As the majority opinion points out, the state appellate court failed to apply the requisite *Chapman* standard of constitutional harmless error. *See Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). I need not determine whether that failure affects our standard of review, for I conclude that the combination of constitutional errors that occurred at Bains's trial meets even the deferential standard of *Brecht v. Abrahamson*, 507 U.S. at

637, 113 S.Ct. 1710.[4] The errors, considered together, "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710 (internal quotation marks omitted). The Miranda violation, the inflammatory evidence regarding the violent tendencies of Sikhs, and the hearsay violations of the confrontation clause, in my view, influenced the verdict in this case.

In order for us to overturn the state's conviction on a legal ground decided by the state, AEDPA requires the state court's adjudication to have "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

---

[4] The Eighth Circuit has ruled that, when the state court erroneously fails to review for harmless error under the *Chapman* standard, then the federal court on habeas review should judge harmlessness under the *Chapman* standard, not the more deferential *Brecht* standard. *See*, e.g., *Harrington v. Iowa*, 109 F.3d 1275, 1279 (8th Cir.1997). Other circuits have held that *Brecht* is the habeas standard even when the state courts have failed to apply *Chapman*. *See Sherman v. Smith*, 89 F.3d 1134, 1140-41 (4th Cir.1996); *Hogue v. Johnson*, 131 F.3d 466, 499 (5th Cir.1997); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir.1995); *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir.1995). The Fifth Circuit has since observed that its rejection of the *Chapman* standard, while still binding in the Fifth Circuit, appears to be inconsistent with the underlying rationale of *Brecht*. *See Barber v. Johnson*, 145 F.3d 234, 236-37 (5th Cir.), cert. denied, 525 U.S. 1005, 119 S.Ct. 518, 142 L.Ed.2d 430 (1998); *see* also *Crespin v. New Mexico*, 144 F.3d 641, 649 n. 6 (10th Cir.) (argument that *Chapman* should apply has some merit, but *Brewer* binds panel and precludes application), cert. denied, 525 U.S. 950, 119 S.Ct. 378, 142 L.Ed.2d 313 (1998).

§ 2254(d). That requirement is met in this case. The admission of Bains's statements made during the station house interrogation was contrary to the Supreme Court's decision in Miranda. In addition, the state's failure to apply the *Chapman* harmless error standard on direct review is contrary to *Chapman* itself, as well as to *Brecht*. *See Brecht*, 507 U.S. at 636, 113 S.Ct. 1710 (*Brecht* review on habeas is appropriate because state will have been required to conduct *Chapman* review); *see* also *Jeffries v. Wood*, 114 F.3d 1484, 1500-01 (9th Cir.1997) (en banc) (state failure to apply *Chapman* is adjudication contrary to clearly established federal law as determined by Supreme Court, for purposes of AEDPA).

Thus Bains's petition meets the standards set by both *Brecht* and AEDPA. Accordingly, I would reverse the decision of the district court and would remand for issuance of the writ if, within a reasonable time, the State fails to initiate a new trial for Bains.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SURINDER BAINS, Petitioner-Appellant, v. STEVE CAMBRA, JAMES H. GOMEZ, Director, Respondents-Appellees.	No. 98-17223 D.C. No. CV-97-02906-FMS Northern District of California (San Francisco) ORDER (Filed July 26, 2000)

Before: Herbert Y.C. Choy, William C. Canby, and Barry G. Silverman, Circuit Judges

Judge Canby voted to grant the petition for rehearing and recommended denial of the petition for rehearing en banc. Judge Silverman voted to deny the petition for rehearing and the petition for rehearing en banc. Judge Choy voted to deny the petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.